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Supreme Court, U.S.
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No. _____

in the

Supreme Court

of the

United States

October Term 1999

SWANSON DALTON,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

I.

Whether the Petitioner was entitled to application of an amendment to the Sentencing Guidelines upon his resentencing, when the issue could not be raised at his initial sentencing due to the application of a Career Offender enhancement.

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The Petitioner, Swanson Dalton, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 22, 1999.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported (Case No. 98-4594) That determination is attached hereto in Appendix 1. The Petitioner was resentenced on July 24, 1998 by the United Stated District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 22, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United

States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner, Swanson Dalton, was originally indicted on October 22, 1993, in two counts of an eight count indictment, charging the Petitioner with: one count of conspiracy to possess with the intent to distribute cocaine, in violation of 21

U.S.C. § 846; and one count of attempt to distribute cocaine, in violation of 21 U.S.C. § 841. The Petitioner plead not guilty, and proceeded to trial. On July 21, 1994, the Petitioner was convicted on both counts, and on March 1, 1995, the Petitioner was sentenced to 360 months incarceration.

The Petitioner appealed his conviction and sentence to this Court (Case No. 95-5193), raising the following issues:

I. The court erred in denying a mistrial based upon prosecutorial misconduct

II. The court's denial of a mistrial was reversible error

III. The court erred in enhancing the Petitioner's sentence under the Career Offender provisions of the Guidelines

This appeal was denied in its entirety on October 17, 1996.

On October 16, 1997, the Petitioner

filed into district court a motion pursuant to 28 U.S.C. § 2255. Due to a vacation of a state conviction, the Petitioner subsequently filed a supplemental motion. Based upon the supplemental motion, the United States Attorney's office conceded the § 2255, and the case was set for a new sentencing hearing. The new sentencing hearing was held on July 17, 1998. At that hearing, the Petitioner challenged a 4 point enhancement under § 3B1.1 of the Sentencing Guidelines. The district court determined that an enhancement was appropriate under the facts of the case. The Petitioner received a sentence of 200 months, with a supervised release term of 5 years.

The Petitioner appealed his sentence to the Fourth Circuit, raising only the issue of the § 3B1.1 enhancement. In denying the appeal, the Court determined that the Petitioner could not have properly have raised the § 3B1.1 enhancement at

resentencing, as he had failed to raise the matter at his original sentencing hearing in 1995.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that his Fifth Amendment right to Due Process of law has been violated. The Petitioner's appeal was denied in the Fourth Circuit based upon his failure to raise the § 3B1.1 issue in his original sentencing hearing in 1995. However, the issue was raised at the original sentencing hearing, but was denied because of then existing Fourth Circuit precedent, which was overturned after the Petitioner's sentencing.

1. The Petitioner was entitled to application of 1993 amendments to the Guidelines upon his resentencing in 1998

The Petitioner contends that the Court of Appeals erred factually and legally by determining that the issue of § 3B1.1 was waived by failing to raise the matter at the Petitioner's initial sentencing hearing

in 1995.

First, the Court of Appeals is flawed because the record shows that in fact, former counsel did object to the § 3B1.1 adjustment. In fact, at the original sentencing hearing, the trial court held ""likewise role in the offense I find that Mr. Dalton was engaged in this conspiracy at least from the first contact when the undercover agent or the confidential informant made the first buy from Mr. Smith through Mrs. Wilson and went to the apartment over there and obviously the drugs immediate supply was Mr. Thomas but the ultimate supply was Mr. Dalton."

The court would not have made findings of fact as to the § 3B1.1 enhancement had counsel not objected. A review of the sentencing hearing transcript from March 1, 1995 makes it clear that counsel did make an objection, and the district court simply used the wrong Guidelines.

The Petitioner would submit that the

district court was confused at the original sentencing because the Fourth Circuit did not clarify the applicability of the November 1, 1993 clarifications to § 3B1.1 until August 10, 1995, the day the case of *United States v. Capers*, 61 F.3d 1100 (4th C. 1995) was decided. *Capers* for the first time in the Fourth Circuit held that a defendant's management of assets of a conspiracy would not support an enhancement under § 3B1.1, absent direct control of another conspirator. Prior to *Capers*, the law in the Fourth Circuit was that management of assets would support an enhancement. *See United States v. Chambers*, 985 F.2d 1263 (4th C. 1993) In fact, as late as late as April 11, 1995, the Court was using *Chambers* to uphold § 3B1.1 enhancements for the management of assets. *See United States v. Wu*, 52 F.3d 323 (4th C. 1995)(unpublished) Therefore, as the Petitioner's sentencing occurred prior to *Capers*, he was entitled to review of this

issue upon resentencing.

Further, the Petitioner would submit that, as the Petitioner was being resentenced after vacation of his Career Offender enhancement, his prior sentence was vacated, and new review of the § 3B1.1 enhancement was required. Most Circuits have held that when a sentence is vacated, de novo review of the entire sentence is appropriate. In the case of *United States v. Hawthorne*, 94 F.3d 118 (4th C. 1996), the Fourth Circuit determined that once a defendant's § 924(c) conviction was overturned, the Government could request a § 2D1.1 enhancement, and that all sentencing issues would be re-determined. *Id.* at 122 (note 3)See also *Pasquarille v. United States*, 130 F.3d 1220,1223 (6th C. 1997)

In the present case, the district court's determination to hold a new sentencing gave the Petitioner another opportunity to address the § 3B1.1 issue,

especially in light of the new Fourth Circuit precedent which proved that the enhancement was improper.

Finally, the Court of Appeals ignored this Court's decision in *Davis v. United States*, 417 U.S. 333 (1963), in which this Court held that § 2255 motions permit relitigation of an issue raised on direct appeal if the defendant is in custody and there is an intervening change of law. Clearly, the Petitioner is in custody and *Capers* presents a change in law in the Fourth Circuit. Therefore, under this additional theory, the Petitioner is entitled to relief.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for a new sentencing hearing without the enhancement under U.S.S.G. § 3B1.1.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS DECISION APRIL 22, 1999

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SWANSON DALTON,
Defendant-Appellant.

No. 98-4594

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Senior District Judge.
(CR-93-171)

Submitted: March 9, 1999

Decided: April 22, 1999

Before WILKINS and MOTZ, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Kevin M. Schad, SCHAD, BUDA, COOK, L.L.C., Cincinnati, Ohio, for Appellant. Robert P. Crouch, Jr., United States Attorney, Joseph W.H. Mott, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Swanson Dalton was convicted in 1994 of conspiracy to distribute and to possess cocaine with intent to distribute, 21 U.S.C. § 846 (1994), and attempting to possess cocaine with intent to distribute, 21 U.S.C. § 841(a) (1994). He appealed his conviction on the ground of prosecutorial misconduct and also contested his career offender sentence of 360 months imprisonment. We affirmed the conviction and sentence. After two of his prior state convictions were overturned, Dalton sought federal habeas relief and the district court ordered resentencing. At the resentencing hearing, Dalton challenged for the first time his four-level adjustment for having a leadership role in the conspiracy, *see U.S. Sentencing Guidelines Manual* § 3B1.1(a) (1997), arguing that an intervening change in the law made the adjustment unwarranted. The district court again found that the adjustment applied and imposed a sentence of 200 months imprisonment. Dalton appeals this sentence. We affirm.

Because Dalton failed to contest the role adjustment at the first sentencing or in his first appeal, he has waived the issue unless it comes within one of the exceptions to the mandate rule. *See United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The rule forecloses litigation of issues not raised in the district court or foregone on appeal unless the "controlling legal authority has changed dramatically," significant new evidence has come to light, or a blatant error in the prior decision will result in serious injustice if not corrected. *Id.* at 67 (quoting *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)).

Dalton argues that our decision in *United States v. Capers*, 61 F.3d 1100 (4th Cir. 1995), changed the controlling authority within this circuit by finding that the defendant must have controlled other participants, not merely drugs or money, for an adjustment under § 3B1.1 to apply. However, *Capers* simply interpreted the 1993 amendment

to the commentary to § 3B.1, finding that the amendment changed the standard for applying the adjustment and "had the effect of changing the law in this circuit." *Capers*, 61 F.3d at 1110. The amendment was in effect when Dalton was first sentenced. No change in the law occurred between his first and second sentencing. Consequently, we find that the issue was waived when Dalton failed to raise it in his first sentencing and appeal. It was not properly raised at the resentencing hearing and is not properly before us in this appeal.

Therefore, we affirm the sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED